

under Section 309(g) of the Clean Water Act (CWA), 33 U.S.C. § 1319(g), Respondent, the City of Sioux Falls, South Dakota (City), was charged with violating its National Pollutant Discharge Elimination System (NPDES) permit and the General Pretreatment Regulation found at 40 C.F.R. Part 403. The penalty proposed for the alleged violations is \$125,000.

The City owns and operates a publicly owned treatment works (POTW) which is authorized, pursuant to its NPDES permit, to discharge treated waste waters into the Big Sioux River, which is one of the "waters of the United States" as defined in 40 C.F.R. § 122.2. In 1985, EPA approved Respondent's Industrial Pretreatment Program, which required Respondent, the POTW, to apply and enforce National Pretreatment Standards. These standards, which apply to Industrial Users ("IUs"), non-domestic sources that discharge wastewater into a POTW, control pollutants that are determined not to be susceptible to

ORDER ON MOTIONS

In the Matter of)
City of Sioux Falls, SD,)
Case No. CWA-VIII-93-)
03-P-II)
Respondent)

BEFORE THE ADMINISTRATOR

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

in the complaint described below, so it is not addressed herein.
supplemented by the motions to dismiss and to strike allegations
followed up by either party, but it is considered to have been
a compilation order, dated September 4, 1992. The motion was not
duplicative, erroneous, or compilation with pursuant to
merits, on grounds that the complaint with prejudice on its
alternative, a dismissal of the complaint with prejudice on its
violation numbered 3, 4, 5, 8-13, and in the
/ The motion requested summary judgment on findings of

City filed a document entitled "Response to Complainant's Motion
amend" and proposed amended complaint. On July 2, 1993, the
motion for leave to file first amended complaint ("motion to
motions by submittals, dated June 14, 1993, including the rewrite
motion for production of documents. Complainant opposed those
to strike and to dismiss certain alleged violations, and a
parties. Under date of May 13, 1993, the City submitted motions
A flurry of motions and responses were filed by the
penalty.

requesting a hearing on those remaining and on the proposed
requesting summary judgment on some findings of violation and
denying the alleged violations, asserting affirmative defenses,
The City answered the complaint on December 11, 1992,
complainant.

Regulations and of the City's NPDES permit were alleged in the
audit, twenty findings of violation of the General Pretreatment
City's Industrial Pretreatment Program. On the basis of the
On April 30 and May 1, 1992, EPA conducted an audit of the
of a POTW.

treatment by a POTW or which would interfere with the operation

opposition included a motion for leave to file an amended filing on the due date, as extended (June 14, 1993). The of May 13, 1993. Complainant's opposition to these motions was its NPDES permit and for the production of documents under date violations not referenced in specific terms and conditions of submitted motions to strike duplicate violations, to dismiss As indicated in the introduction of this order, the City

I. Complainant's Motions to Strike

D I S C U S S I O N

discussed below.

respect to penalty calculations. All of these motions are discovery on October 21, 1993, to depose two EPA employees with which the City replied on October 28, 1993. The City moved for memorandum in support of its motion to amend the complainant, to untimely. Subsequently, Complainant filed a supplemental complaint opposed the latter such submission of the City as and to dismiss and on the motion to amend the complainant. memorandum supporting their positions on the motions to strike and August 13, 1993, the parties submitted supplemental and August 14, 1993. Under dates of July 19, August 3, strike, dated July 12, 1993, from the City to the undersigned Administrative Law Judge (ALJ) was objected to by Complainant in a motion to definite pre-hearing exchange on July 7, 1993. A letter, dated motion to dismiss. Complainant filed a motion for a more to dismiss, "which replies to Complainant's opposition to the

or motion is due to be filed
advantage of the date on which the pleading, document,
cause shown The motion shall be filed in
timely motion of a party to the proceeding, for good
filing of any pleading, document, or motion (1) upon
officer may grant an extension of time for the
(b) Extensions of time. The Filing

part:
Under 40 C.F.R. § 22.07(c), five days are added to the time
allowed for responses to pleadings and documents where they are
served by mail. 40 C.F.R. § 22.07(b) provides, in pertinent

the motion.
deemed to have waived any objection to the granting of
within the designated period, the parties may be
allowed for such response. If no response is filed
written motion must be filed within ten (10) days
after service of such motion, unless additional time
responses to motions. A party's response to any

27 40 C.F.R. § 22.16(b) provides, in part:

To Dismiss and To Bar Response To EPA's Motion To Amend Its
"Complainant's Motion To Strike Response To Complainant's Motion
On July 7, 1993, Complainant filed a document entitled
the motion to amend the complainant would be forthcoming.
basis of the present pleadings and that a further response to
city's position that the proceeding should be handled on the
to Dismiss." This document and the cover letter stated the
city filed a document entitled "Response To Complainant's Motion
later than June 29, 1993. Under date of July 2, 1993, the
the city's response to the motion to amend was to be filed not
responses to motions where service is by mail (Rule 22.07(c)),
complainant. Considering the five days additional time for filing

has been made and no reason for the absences has been advanced.
June 19 through June 28, 1993. No claim of excusable neglect
corrected the June days of absence from the office as being from
Amended Complaint" ("Supplemental Motion To File An
And To Dismiss And In Support Of City's Motions To Strike
"Supplemental Memorandum In Support Of City's Motions To Strike
a/ In a cover letter, dated July 19, 1993, forwarding its

responding to a motion that did not exist.
dismiss any portion of the complaint and that the City was
notwithstanding its contention that it had not filed a motion to
3/ Complainant selected this title for the motion,

and State's earlier requests to reevaluate the case.
treated] as a routine matter after Complainant ignored the City
strongly opposed to Complainant's motion to amend [being
than 30 days. Additionally, the letter stated that the City was
intended to have these documents ready for filing in no more
Complainant's motion to amend the complaint and that the City
preparing a memorandum with supporting affidavits in response to
1993. The letter further stated that the City was currently
June 14 through June 19, 1993, and from July 6 through July 10,
the City stated that she had been absent from the office from
In a letter to the ALJ, dated July 12, 1993, counsel for
should be barred.

stricken as untimely and that any further response to the motion
argued that the City's response to the motion to amend should be
in which to serve a response brief. Accordingly, Complainant
was untimely and that the City had not moved for additional time
Complainant." The motion pointed out that the City's response

than any reevaluation after the complaint has been issued. This period required by CWA § 309(g)(4) is a far different matter "reevaluating the case" during the public notice and comment period requested by the complainant. It is apparent, however, that amend the complaint. In fact, Complainant says that its reevaluation of the case, led to the filing of the motion to "uniquocally false." In fact, Complainant says that its City and State's earlier requests to reevaluate the case" is that Complainant filed the motion to amend "after ignoring the complaint and that the statement in the City's July 12 letter April that Complainant intended to file a motion to amend the Complainant avers that counsel for the City has known since Rule 22.08 is not applicable.

July 12 letter was not an improper ex parte communication and has acknowledged receipt of a copy thereof. Accordingly, the that a copy was mailed to counsel for Complainant and counsel in the proceeding. . . ." The City's July 12 letter reflects by or on behalf of any party shall be regarded as argument made pendency of the proceeding and relating to the merits thereof, the Administrator. . . or the President Officer during the "any ex parte memorandum or other communication addressed to "parte" from the language of the rule providing in part that discussion of proceeding and relating to the merits thereof, the motion purports to quote from Rule 22.08 entitled "Ex parte upon the ground that it was an ex parte communication. The letter, dated July 12, 1993, and a motion to strike the letter

§⁵ Supplemental Memorandum at 9, 10. FRCP Rule 11 provides in part that the signature of an attorney or party "constitutes a certificate by the signer that the signer has read the pleading, motion or other paper [and] that to the best of the signer's knowledge, information or belief formed after reasonable inquiry it is well grounded in fact and warranted by existing law. . . . The rule provides for sanctions for infringing law.

In its Supplemental Memorandum, served on July 19, 1993 (supra note 4), the City, inter alia, reiterated the charge that the Agency abruptly and without notice changed its procedures and that, although EPA officials were aware of the errors in the complaint, complainant ignored State and City comments (Id. 8). Additionally, the City argued that under § 309(g)(2) of the Act, EPA was authorized to issue a compliance order or to bring a civil action, but was not authorized to do both as it was attempting here. Opposing the motion to amend, the City contends that this is a case where sanctions should be imposed on the Agency pursuant to FRCP Rule 11.

is true even if Complainant's assertion that it acknowledged deficiencies in the complaint in the April phone conversations with counsel for the City is credited. The City is apparently referring, inter alia, to a letter from the State, dated November 6, 1992, submitted during the public comment period and to a second letter, dated December 16, 1992, submitted by the State after the complainant was issued. These circumstances indicate that there is no warrant for Complainant's extravagant claim that the quoted statement in the City's letter is

Despite Complainant's acknowledgement that the Rules of Practice do not provide for response briefs (Motion to Strike, dated July 7, 1993), Complainant filed a memorandum in opposition to the City's Supplemental Memorandum on August 3, 1993 ("C's Opposition"). Complainant argues, inter alia, that the City's opposition to its motion to amend is untimely and should be stricken, that FRCP Rule 11 is not applicable, that the Agency has not acted in bad faith, but has been responsive to the City's concerns and that there is no basis for the City's motions to strike and to dismiss.

If sanctions were available in this forum, Complainant says misleading the court and confusing the administrative process from the inception of this litigation. As examples, Complainant cites the City's "relentless contravention of the Part 22 procedural rules" and the alleged fact that its supplemental memorandum is replete with "misrepresentations and lies." (Id. at 3). The City's statement that it informed EPA's current council of the complaint, deficiencies on November 6, 1992, allegedly "are lies" (sic) (C's Opposition at 4).

Motions To Strike And To Dismiss And In Opposition To EPA's
Motion To File An Amended Complaint ("Second Supplemental
Memorandum"), dated August 13, 1993.

ii

Professional Responsibility and Code of Judicial Conduct (ABA
Professional Responsibility Code of Judicial Conduct (ABA
See, e.g., EC-37, EC-38 and DR 7-101, Model Code of
Lawyer or derogatory references to opposing counsel and should avoid
unfair or which specify, inter alia, that a lawyer should not make
1980), which specifies, inter alia, that a lawyer should not make
aware that EPA legal counsel was in attendance at early meetings
earlier counsel for the Agency. City officials were assertedly
that City officials were not aware of the physical condition of
the City denied waging a campaign to mislead the court, averring
presentations made prior to the issuance of the complaint.
different conclusions have been drawn from meetings held and
deteriorating nature of [EPA's] comments, it appeared that
memorandum, pointing out that in view of the unfortunate
The City responded mildly to complainant's vituperative
which are alleged to be false.

appears to have a reasonable explanation for the statements
before this Alt. This is especially so here, because the City
as accusing opposing counsel of lying is not acceptable practice
to the public for proper behavior. Vituperative language such
government and who, accordingly, have an additional obligation
especially inappropriate for lawyers who represent the
in the resolution of the underlying controversy, and are
of professional responsibility, hinder, rather than assist,
such abusive allegations are not in keeping with the code

are out of time. See, e.g., E. I. du Pont de Nemours & Co.,
permitted, but not required, to accept or excuse filings which
the law favors resolution of cases on their merits and I am
relief sought by the opposing party must be granted. Instead,
mean that the pleading or response should be struck or that the
or response to a motion is filed or served out of time, does not
the mere fact a pleading, motion for an extension of time,
complainant's motions to strike will be denied. Firstly,
by filing a motion to strike on August 25, 1993.

complainant responded to the Second Supplemental Memorandum
by the Agency.

concerning inaccuracies in the complainant proposed to be issued
was aware of information previously supplied by the City
earlier December 1992] it was not unreasonable to assume that she
attended a meeting with representatives of the City and EPA [in
Moreover, the City asserts that, because current EPA counsel
from having issued the complainant without correcting the errors.
counsel was not aware of these statements does not excuse EPA
the issuance of the complainant and says that the fact present
attention of EPA officials both orally and in writing prior to
that errors, omissions and inaccuracies were called to the
where statements which the City believed were not correct were
identified for EPA officials. The City summarized its position

Document No. TSCA-III-540 (Order Granting Motion To Dismiss, June 25, 1992) (even though complainant was 49 days late in responding to a motion to dismiss, the motion was granted only after a careful review wherein it was concluded that complainant was unlikely to prevail on the facts alleged). See also Asbestos Specialists, Inc., TSCA Appeal No. 92-3 (EAB, October 6, 1993) (it was error to rely upon Rule 22.16(b), supra note 2, as a basis for dismissing the complaint where it was clear that complainant opposed the motion). Here, the City served a response memorandum on July 2, 1993, which, although curiously titled, made it clear that the City opposed the motion to amend. This opposition was reiterated in the City's Letter of July 12. Under these circumstances, it lies in the face of reality to proceed as if the motion were unopposed. Moreover, as will be seen, consideration of the City's supplemental memorandum does not alter the ruling on the motion.

In Hardin County, Ohio, RCRA (3008) Appeal No. 92-1, Order Denying Reconsideration (EAB, February 4, 1993), a reply to a response to a motion, which had been filed without moving in advance for leave therefore, was struck upon the ground that the rules of practice made no provision for filing such documents. Although this rule could be applied here, neither party has

assessments of a civil penalty shall include: . . . (2) Specific for the
reference to each provision of the Act and implementing regulations
toions which respondent is alleged to have violated

July 14, and August 25, 1993.
July 7,
1993, and reply memorandum (motions to strike) on October 21,
memorandum in support of its motion to amend on October 21,
Supplemental Memorandum on August 3, 1993, a supplemental
nevertheless, proceeded to file an opposition to the City's
aware that the Rules of Practice made no provision therefore,
sense ex parte. Moreover, Complainant, although admittedly
out of the City's Letter, dated July 12, 1993, which was in no
view of Complainant, a attempt to make an ex parte communication
the Part 22 procedural rules (C, s opposition) is hypocritical in
§. The charge that the City has relentlessly contravened

Federal Regulations. He argues that a single audit that reveals
being based on only five different sections of the Code of
be referenced to federal law, and that the rest are duplicated,
Mr. Kappel asserts that two of the alleged violations could not
allegedly violated, as required by 40 C.F.R. § 22.14(a).
the Clean Water Act or implementing regulations which were
include references to any provisions of the City's NPDES permit,
complainant contains twenty findings of violation, but does not
facial information and legal argument for the motion. The
Kappel, the City's Environmental Compliance Manager, provides
duplicated in the complaint. In support, an affidavit of Robert
The City has moved to strike alleged violations that are

III. The City's Motions To Strike and To Dismiss and
Complainant's Motion to Amend the Complaint

scrupulously adhered to the Rules of Practice and I decline to

do so.

several violations of the same regulations should be treated as a single violation.¹⁰ He alleges that the complaint was not subject to prior analysis or review, and that not all relevant factors were taken into account. As an example, he states that following an EPA inspection in 1991, the City submitted a schedule to correct the deficiencies, but received no response from EPA. According to Mr. Kappel, the City received no audit findings, which listed 22 required corrective actions, on August 10, 1992, and had completed 18 of the required actions by September 4, 1992. The City claims that it did not receive adequate support and guidance from EPA, and that without prior notice or opportunity to consult or comply with EPA's requests for changes, EPA issued a compliance order, received by the City on September 4, 1992, and then issued the complaint in November 1992. Moreover, Mr. Kappel states that the City has continued to improve its pretreatment procedures, and that it has received awards for excellence in operation and maintenance.

The City has moved to dismiss findings of violation relating to conditions not contained or referenced in the specific terms and conditions of its NPDES permit. Another affidavit of Robert Kappel is provided in support, containing factual and legal argument. Mr. Kappel alleges that EPA is upset which leads to simultaneous violations of more than one pollutant parameter.

Mr. Kappel cites section 309(g)(3) of the CWA which requires treating as a single violation a single violation a single operation of more than one pollutant parameter.

He alleges that the complaint was not subject to prior analysis or review, and that not all relevant factors were taken into account. As an example, he states that following an EPA inspection in 1991, the City submitted a schedule to correct the deficiencies, but received no response from EPA. According to Mr. Kappel, the City received no audit findings, which listed 22 required corrective actions, on August 10, 1992, and had completed 18 of the required actions by September 4, 1992. The City claims that it did not receive adequate support and guidance from EPA, and that without prior notice or opportunity to consult or comply with EPA's requests for changes, EPA issued a compliance order, received by the City on September 4, 1992, and then issued the complaint in November 1992. Moreover, Mr. Kappel states that the City has continued to improve its pretreatment procedures, and that it has received awards for excellence in operation and maintenance.

attempting to unilaterally modify the City's pretreatment program requirements and NPDES permit, which does not have a provision allowing EPA to unilaterally amend POTW pretreatment programs. While the City's proposed 1994 NPDES permit does contain such a provision, he argues that it cannot form the basis for a penalty assessment until the current permit is modified. He avers that the City submitted schedules and modifications to address audit deficiencies, but did not receive timely or adequate formal guidance or approvals from EPA.

The City's arguments set forth in its memorandum in support of the motion to dismiss expand further the arguments set forth sought for violations of pretreatment standards which are not included as conditions of its NPDES permit, and points out that EPA has not followed prescribed methods of modifying or incorporating new conditions into an NPDES permit or the same procedures (in 40 C.F.R. § 403.18(b)) applicable to a NPDES permit has been proposed, but is not an enforceable part of the current (1989) permit. Assuming that EPA must adhere to the same procedures (in 40 C.F.R. § 403.18(b)) applicable to a pretreatment program, the City argues that EPA did not follow permittee for a substantial modification of an industrial pretreatment program, the City argues that EPA did not follow

opportunity to comment.
Act to consult with the State prior to assessing an administrative
penalty and § 309(g)(4) provides for public notice and
opportunity to comment.

13. The Agency is, however, required by § 309(g)(1) of the
CWA to provide a permit pursuant to this section shall
be deemed compliance for purposes of sections 1319 and 1365 of
this title, which sections 1311, 1312, 1316, 1317 and 1343 of
this title, with sections 1311, 1312, 1316, 1317 and 1343 of
Section 402(k) of the CWA provides, in pertinent part,

(7th Cir. 1978).
14. See, e.g., Inland Steel Co. v. EPA, 574 F.2d 367, 369-73

add any new violations, and consolidates allegations of
forth in subsections of the federal regulations. It does not
charge the City with violations of several regulations set
enforcement action under the CWA.¹³ The amended complaint
here is no duty for it to notify a violator prior to taking
violations of the compliance order. Complainant points out that
parallel proceedings, and the present action does not allege
present enforcement action, complainant explains that they are
the EPA compliance order, dated August 31, 1992, from the
citations to regulations and permit conditions. Distinguishing
to consolidate duplicate claims and to add appropriate
filling a motion to amend the complaint to correct those errors,
citations to regulatory and permit provisions, concurrently
acknowledges its failure to identify some of the violations with
in opposition to the motion to strike, complainant
Section 402(k) of the CWA.¹⁴

known as the "permit-as-a-shield defense," and is based upon
of specific conditions contained in the permit.¹⁵ This is

deficiencies following the June 19, 1991, inspection and
City avers that it had corrected many of the alleged
in its Supplemental Memorandum, dated July 19, 1993, the
case should be handled on the basis of the present pleadings.
Later moved to amend the complaint, the City contends that the
Complainant knew its allegations were questionable. Yet only much
which fail to state a permit violation. Emphasizing that
defense, but rather that it seeks to dismiss those allegations
submitted, explaining that it is not asserting an estoppel
The City counters these arguments in its July 2, 1993,
estoppel against the government.

In opposition to the motion to dismiss, Complainant asserts
that the proposed 1994 NPPES permit is not at issue; rather, the
City is charged with violations of the General Pretreatment
Regulations of 40 C.F.R. Part 403 and with violations of its
1989 NPPES permit. Complainant says that the City's defense of
inadequate oversight of its pretreatment program by EPA is not
affirmative misconduct, which is the only viable ground of

Memorandum in Opposition, dated June 14, 1993, at 5).
subjection of those regulations or the permit (Complainant's
urges that it is appropriate for EPA to seek penalties for each
Part 403 and conditions in the City's NPPES permit. Complainant
resulting in fourteen findings alleging violations of 40 C.F.R.
violation that were duplicated in the initial complaint,

Supplemental Memorandum at 8 - 9. This argument
seemingly is more appropriately considered in mitigation of the
proposed penalty.

procedural changes." It asserts that it was entitled to be informed of "abrupt
and other submissions. Without citing any authority, the City
responds to the City's proposed compliance schedules, ordinances
deficiencies and improvements, as well as EPA's failure to
prior practice of consultation concerning pretreatment program
complainant, and emphasizes EPA's abandonment of its long-standing
responding to EPA's errors and omissions in the initial
4. The City refers to the unnecessary expense it incurred in
in the April 30, 1992 audit. See Affidavit of Lyle Johnson at
previously submitted schedule to correct the deficiencies found
repeated most of the requirements identified by the City in its
to the City the compliance order issued on August 30, 1992,
Support of Motion to Strike, at unnumbered page 2). According
(Supplemental Memorandum at 3; Affidavit of Robert Kappel in
rating, including consideration of the pretreatment program
deficiencies were observed," and gave a satisfactory overall
Resources (SDENR) is cited in support, which noted that "(a) O
1992, by the South Dakota Department of Environment and Natural
April 30, 1992, audits. A report of inspection on June 30,

It appears that this section was merely to make clear that the addition of administrative penalty authority was not intended to affect the Administrator's authority to issue and enforce compliance orders. Upon a finding of violation, § 309(g) establishes only three conditions for the assessment of a penalty, i.e., consultation with the State, notice and opportunity for a hearing in accordance with § 554 of title 5 and notice and opportunity for public comment.

Nothing in this subsection shall change the procedures existing on the day before February 4, 1987, under other subsections of this section for issuance and enforcement of orders by the Administrator and enforcement of orders by the

(11) Protection of existing procedures

§ 309(g), referring specifically to § 309(g)(11). This section provides:

Memorandum at 11 - 12).

The City argues that amended complaint is a "total rewrite having very little similarity to the original complaint," containing new issues and including a new method of computation, and is prejudicial, because it will require another complete review and re-analysis (Supplemental was added to the Act by the Water Quality Act of 1987 (P.L. 100-4, February 4, 1987). Section 309(g)(11) provides:

EPA may issue a complaint order or bring a civil action, but not both, and that this applies to administrative actions under § 309(g), referring specifically to § 309(g)(11). The City claims that the amended complaint is a "rewritten

Disagreements with the claim that prior inspections resulted in satisfactory ratings by SDENR, complainant alleges a continued history of deficiencies, i.e., failure for several years to implement key pre-treatment program requirements.

(C's Opposition at 3, 4).

• 576 Johnson AE 47

Finding of violation number 4 of the proposed amended
complaint alleges that the City's ordinance did not authorize
penalty amount of \$1,000 per day of violation by an IU. The
City explains that the South Dakota state law did not authorize
it to impose \$1,000 penalty provisions until July 1, 1992, and
alleges that EPA failed to review and approve the City's
proposed ordinance expeditiously, causing delay in adopting the
new penalty provisions (Supplemental Memorandum at 4; Affidavit

Asbestos Specialists, Inc., supra, for the proposal that
complainant submitted a supplemental memorandum, citing In re
Subsequent to the City's July 19, 1993, memorandum,
(13).

authority from the South Dakota Legislature" (C's Opposition at
City "did not exhibit a willingness to pursue the required
regulation by November 16, 1990, and that the proposed
regulation concerning the pre-treatment penalty authority
proposed amend complaint, complainant alleges that the federal
with regard to finding of violation number 4 of the
inspection were presented as routine or minor.

The City's allegation that the deficiencies from the 1991
pattern of non-compliance. Complainant characterizes as false
action until the City demonstrated a consistent and repeated
alleges that it did not make a decision to take any enforcement
to fully evaluate a pre-treatment program. Complainant also
emphasizing that the SDDENR does not have authority or expertise
and effect of the different types of inspections performed,
complainant provides a description of the content, significance
held annual regional workshops for pre-treatment programs.
provide adequate supervision and guidance. EPA states that it
complainant also disagrees with the claim that it did not

admittable by amendment that leave to amend should be denied.")

The City distinguishes asbestos specialists by alleging

that it was precluded by Complainant's actions. The City repeats assertions that EPA ignored conversations initiated by the City and information submitted by the City demonstrating the erroneous nature of the original complaint, both before and after it was filed, and that it was forced to incur a substantial expenditure of funds in order to respond to the initial erroneous Complaint (Response, dated October 28, 1993).

The City argues that EPA violated its statutory obligation to take into account the nature, circumstances, extent and gravity of the violation by failing to properly investigate the allegations. The City concludes that the City should not be amended without compensating the City for its expenses to be amended. The City concudes that the complainant should not be granted.

A plethora of paper has been filed concerning the three motion to dismiss be granted.

A plethora of paper has been filed concerning the three motion to amend to be granted.

The parties agree that the original complaint was the amended complaint.

to strike certain allegations are still viable with respect to granted, the next question is whether the motions to dismiss and addresses is whether to grant the motion to amend. If it is motions, including several affidavits. The first question to

strike certain allegations are still viable with respect to the original complaint numbered three, definitive. For example, findings of violation numbered three,

Violation:

four and six in the original complaint appear to allege the same

(emphases added).

floor drain next to the Platting room. . . .

colored staining water was observed in a determined to be questionable and dis- wastewater pretreatment-recycle system was site visit, the operational status of the discharge, facility. However, during the little. Dakota Platting claims to be a "no of wastewater discharges from these facilities. Dakota Platting has little or no information on the nature have not been issued to permit. The City potential sites identified by the City which discharge (Schwartz Mfg.), and many other discharges. Dakota Platting yet to (Dakota Platting), another CIU yet to

6) The Audit identified one known CIU

classified as SITs (emphases added).

determining whether the facility to be followed-up by the City to adequately identified in the list require further identification to correct the service area. Several facilities all major water users . . . within WTP classified area. Within the WTP all major water users . . . within the WTP service area.

4) The City recently compiled a listing of service area. Several facilities were identified in the list require further identification to correct the service area. Walk-through suspect that more SITs are present within the WTP service area. Walk-through suspect that more SITs are present within IMS collected sufficient information to of the telephone directory and the City's current users. However, a cursory review permits and water billing records for through review of new commercial building (IMS) are performed on an ongoing basis updates of its Industrial Waste Survey plant (WTP). The City indicated that discharging to the wastewater treatment different base of industrial users (IUs) city personnel lack knowledge of the

added).

category industrial users (emphases added).

that were inspected were determined to be facility status. Two of the facilities identified as SITs were completed as part of the audit. More facilities were identified as needing additional identification to correct the service area. Walk-through suspect that more SITs are present within the WTP service area. Walk-through suspect that more SITs are present within IMS collected sufficient information to of the telephone directory and the City's current users. However, a cursory review permits and water billing records for through review of new commercial building (IMS) are performed on an ongoing basis updates of its Industrial Waste Survey plant (WTP). The City indicated that discharging to the wastewater treatment different base of industrial users (IUs) city personnel lack knowledge of the

Violation:

6) 40 C.F.R. § 403.8(f)(2)(i) requires
that a POTW develop and implement
procedures to ensure compliance with the
regulations of a Pretreatment Program,
which at a minimum, enable the POTW to,
"identify the characteristics and volume of
pollutants contributed to the POTW by the
industrial users Section I(2)(a)
of Part III of Respondent's NDEE permits
further requirements that Respondent
"initiate and update, as necessary,
records identifying the nature and
character of industrial user inputs."
Records of industrial user inputs and
responses of respondents to violations
to adequately handle records failed to
facilitate should be classified as [SUS].
Therefore, Respondent violated 40
C.F.R. § 403.8(f)(2)(i) and Section

(5) 40 C.F.R. § 403.8 (f) (2) (i) requires that POTW develop and implement procedures to ensure compliance with the requirements of a Pretreatment Program, which at a minimum, enables sure compliance with the requirements of a Pretreatment Program, "[(i)] dentify and locate all possible industrial users which might be subject to the POTW Pretreatment authority of Industrial users made under this paragraph shall be made available to the Regional Administrator, index or program. Any complaint, investigation or request . . . The Audit revealed that respondents failed develop [sic] and implement procedures to ensure compliance with the requirements of a Pretreatment Program, enabling Respondents to identify and locate all possible industrial users which might be subject to its Pretreatment program to obtain information needed to determine the facility status of at least two [CITUS], Schwartz Manufacturing and Dakota Plating. Therefore, Respondent

of violation numbers 5 and 6:

The proposed amended complaint more clearly alleges in findings

16 Some of the findings of violation alleged in the original complaint do not appear to have a counterpart in the proposed amended complaint.

The City's arguments do not counterbalance in this case the generally accepted principle that "administrative pleadings are generally construed and easily amended," and that permission to amend a complaint will ordinarily be freely granted. In re Port of Oakland and Great Lakes Dredge and Dock Company, MPRSA Appeal No. 91-1, Final Decision and Order (EAB, August 5, 1992); In re Wego Chemical & Mineral Corp., TSCA Appeal No. 92-4, Final Decision at 15, n. 11 (EAB, February 24, 1993); Yaffe Iron & Metal Company, Inc. v. U.S. EPA, 774 F.2d 1008, 1012 (10th Cir. 1985). The general rule is that amendments to pleadings will be liberally granted where the ends of justice will thereby be served and no prejudice to the opposing party results. Forman v. Davis, 371 U.S. 178 (1962). "It is only where the effect in the

Whi~~le~~ the proposed amended complainant contains fewer findings of violation and is not worded exactly the same as the original complainant, the allegations of violation are essentially the same.¹⁶ Each of the findings of violation alleged in the proposed amended complainant is a restatement of one or more findings of violation in the original complainant. The original complainant provided the City with adequate notice of the factual allegations of all of the violations charged, albeit citations to the NPDES permit conditions and to federal regulations were lacking for most allegations.

The City has not shown that it would be prejudiced by the amended complaint. To justify denial of a motion to amend, a respondent must show "serious disadvantage," meaning it would be seriously prejudiced in [its] defense on the merits." In re AZS Corporation, Docket No. TSCA-90-H-23, Order Denying in Part Motion to Amend Complaint (March 18, 1993), citing Port of Oakland, supra, and Hodgson v. Collonades, Inc., 472 F.2d 420, at 21; *Citing Bank v. Pitts*, 928 F.2d 1108, 1112 (11th Cir. 1991) (where a more careful draft of the complaint might state a claim upon which relief may be granted, the plaintiff should be given an opportunity to amend its complaint, even where the plaintiff does not seek leave until after the district court renders final judgment).

More, Federal Practice ¶ 12.14 and cases cited therein. In re Asbestos Specialists, Inc., supra, citing 3 be denied." In re Asbestos Specialists, Inc., supra, cite 3 complaint is not curable by amendment that leave to amend should be denied.

Motions to amend a complaint have been denied on the basis of undue delay where the amendments are sought on the eve of trial and they would substantially expand the scope of trial. In re Everwood Treatment Company, Inc. and Carry W. Thigpen, Document No. RCRA-IV-92-15-R, Order Denying Motion to Amend Complaint at 9-10 (July 28, 1993). In this case, the motion to amend was not filed on the eve of a hearing, and the amendments do not essentially change the nature of the violations being complained, even where the complainant was aware of or could have anticipated the effects, do not constitute prejudice within the meaning of the rule concerning amendments. A motion to amend a complaint has been granted where it was opposed on grounds that it would be grossly unfair to allow a new claim after considerable time had elapsed, requiring a different factual defense, when complainant should have been alerted to deficiencies in its proof. In re Span and Company, Inc., Document Nos. EPCRA-III-037 and 048, Order Granting Motion to Amend the Complaint (April 9, 1992). ("Prejudice . . . means more than mere inconvenience or added expense.") In a situation similar to the present matter, prejudice was not demonstrated where complainant allegedly refused to meet with the respondent to clarify facts prior to filing the complaint, which could have avoided inaccuracies therein. In re Reynolds Metals Company,

In re Everwood Treatment Company, Inc. and Carry W. Thigpen, Document No. RCRA-IV-92-15-R, Order Denying Motion to Amend Complaint at 9-10 (July 28, 1993). In this case, the motion to amend was not filed on the eve of a hearing, and the amendments do not essentially change the nature of the violations being complained, even where the complainant was aware of or could have anticipated the effects, do not constitute pre-judice within the meaning of the rule concerning amendments. A motion to amend a complaint has been granted where it was opposed on grounds that it would be grossly unfair to allow a new claim after considerable time had elapsed, requiring a different factual defense, when complainant should have been alerted to the scope of trial and they would substantially expand the scope of trial. In re Everwood Treatment Company, Inc. and Carry W. Thigpen, Document No. RCRA-IV-92-15-R, Order Denying Motion to Amend Complaint at 9-10 (July 28, 1993). In this case, the motion to amend was not filed on the eve of a hearing, and the amendments do not essentially change the nature of the violations being complained, even where the complainant was aware of or could have anticipated the effects, do not constitute pre-judice within the meaning of the rule concerning amendments. A motion to amend a complaint has been granted where it was opposed on grounds that it would be grossly unfair to allow a new claim after considerable time had elapsed, requiring a different factual defense, when complainant should have been alerted to the scope of trial and they would substantially expand the scope of trial.

dated June 14, 1993.

Penalty, and Notice of Opportunity to Request a Hearing Thereon, Fact and Violation, Notice of Proposed Assessment of a Civil Penalty to the First Amended Adminisistrative Complaint, Findings of refection No. RCRA-1092-05-30-3008 (a), Order Granting Motion to Amend Complainant (February 5, 1993).

In federal courts, motions to strike are not favored, and "matter will not be stricken unless it is clear that it can have no possible bearing upon the subject matter of the litigation." 2A Moore's Federal Practice ¶ 12.21[2] (2d ed.). Even if allegations are redundant or immaterial, they should be stricken only if they are prejudicial to the moving party. Id.; Fink v. Declassis, 745 F.Supp. 509 (N.D. Ill. 1990). The arguments in support of the City's motion to strike, including its alleged substantial compliance with EPA's regulation in EPA's 1992 Audit Findings, SDENR's inspection reports, and that the state law did not authorize a \$1,000 per day penalty until July 1992, are relevant to the amount of any penalties, but do not meet the standards for granting motions to

to amend is granted.

The extent to which the motions are still viable if the motion to amend is granted. The City does not address the question of original complainant. The City's motion to strike addresses the City's motions to dismiss and to strike address the "matter will not be stricken from a pleading unless it is clear that it can have no possible bearing upon the subject matter of the litigation." 2A Moore's Federal Practice ¶ 12.21[2]

complainant in this proceeding.

complainant will be accepted into the record as the amended complainant will be granted, and the proposed first amended complaint reasons, the Complainant's motion to amend the

Amend Complainant (February 5, 1993).

Document No. RCRA-1092-05-30-3008 (a), Order Granting Motion to

strike. In the amended complaint, federal regulation and permit provisions are cited for each of the fourteen findings of violation, some findings of violation which were duplicate have been consolidated, and prejudice has not been demonstrated. The city's argument that it improved or corrected its treatment procedures and received awards for excellence have no bearing on liability. The fact that the city may have proceeded at issue, which is not based on that order. At issue here is a civil penalty assessment for past violations, which is distinct from the issue of bringing a facility which is in violation into compliance, to which a compliance order is directed. The city's arguments are matters to be considered in mitigation of the proposed penalty, but do not warrant striking any of the allegations of violation in the amended complaint.

18/ The penalty calculations are based on a period of liability beginning June, 1991 until September, 1992." (Complainant's Pre-hearing Exchange, Exhibit 3.) Compare the language of section 309(a), "[w]henever . . . the Administrator finds that any person is in violation of any order . . . , " addressing compliance orders and civil actions, with section 309(g), "[w]henever . . . the Administrator finds that any person has violated . . . , " addressing administrative penalties that any person has violated . . . , the Administrator finds that any person is in violation of any order . . . , " addressing compliance assessments (emphasis added).

violations.

component of the penalty includes consideration of the number of counted as a single violation for the month," and the gravity each reportable noncompliance criterion that is met is that "each penalty calculation worksheet, states exchange Exhibit 3, the penalty calculation worksheet, states of 40 C.F.R. § 403.8(f)(2) (v). Complainant's pre-hearing findings of violation numbered 11 and 12 both alleged violations 403.8.(f)(2)(iv) and of section I(2)(e) of the NPDES permit. Violation of violation numbered 9 and 10, both alleged

a civil penalty may be assessed in accordance with CWA section violated a permit condition as alleged in the amended complaint, conditions of the permit, so if it is proven that the City imposed. The complainant alleges violations of certain violations upon which separate or increased penalties may be violation may not necessarily constitute separate or continuing not included in its NPDES permit. However, these findings of enforce requirements of federal regulatory provisions which are conditions in the permit. The City questions whether EPA may only violations of 40 C.F.R. Part 403, and not violations of 1 through 5, 7, 8, 11 and 13 of the amended complainant allege as to the motion to dismiss, findings of violation numbered

27) As indicated below, depositions are expected to be taken
of two individuals who were involved with calculating the
penalty; the issue of separate violations, and the calculation
of the penalty in accordance with the amended complaint, may be
further illuminated thereby.

(3) In determining the amount of any civil penalty assessed
under this subsection, the Administrator . . . shall take
into account the nature, circumstances, extent and gravity
of the violation, or violations . . .

(1) The amount of a class II civil penalty under this paragraph
may not exceed \$10,000 per day during which the
violation continues; except that the maximum amount of any
violation continues, under this paragraph shall not
exceed \$125,000.

(2) * * *

(A) whenever on the basis of any information available --
the Administrator finds that any person has violated
section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this
title, or has violated any permit condition or limitation
implementing any of such sections in a permit . . . the
Administrator may issue such sections in a permit . . .
to establish a prima facie case or other grounds which show no
respondent, an action may be dismissed "on the basis of failure
to establish a prima facie case or other grounds which show no
right to relief on the part of the complainant" (Rule 22.20(a)).

28) Section 309(g) of the CWA provides, in pertinent part:

Under the Consolidated Rules of Practice, upon motion of
any respondent, an action may be dismissed "on the basis of failure
to establish a prima facie case or other grounds which show no
right to relief on the part of the complainant" (Rule 22.20(a)).

From the record at this point in the proceeding,²⁷⁾ separate
findings of violation in the amended complaint constitute
separate violations has not been fully briefed and is not clear
from the record at this point in the proceeding.²⁷⁾

309(g), 33 U.S.C. § 1319(g).²⁸⁾ The extent to which the

proposed in the complaint. One individual, Mr. Bruce Kent, is two individuals who were involved with calculating the penalty on October 21, the City moved to take the depositions of documents relevant to the penalty calculation.

In its submission, it appears that Complainant possesses additional motion, if it will be denied at this time. The City may, of course, renew the calculation worksheet. The motion for production of documents hearing exchange documents which included the penalty June 28, 1993, and October 29, 1993, Complainant filed pre-discovery by means of the pre-hearing exchange. Under dates of in conformance with 40 C.F.R. § 22.19(b), which provides for the pre-hearing exchange documents are due to be filed, and not was filed prematurely, prior to the date of June 28, 1993, when documents. In opposition, Complainant asserts that the motion into evidence at the hearing, including penalty calculation documents and exhibits which Complainant intends to introduce motion for production of documents. It requested copies of all in its submission, dated May 14, 1993, the City included a

III. Motions Regarding Discovery

of violation, Complainant has no right to relief or has failed to establish a claim. As noted above, there is a question as to the number of violations at issue in this proceeding. For these reasons, the motion to dismiss will be denied.

22 The parties are directed to inform me when the depositions are completed. I will then telephone directly contact the hearing, which will be held in Sioux Falls, South Dakota.

noted is the City's failure to include a certificate of service document the City intends to introduce into evidence. Also requests at least an index of, and identification of, each exhibits it intends to introduce into evidence, Complainant exchanged nor indicated when it will exchange documents and a brief narrative summary of expected testimony as required by 40 C.F.R. § 22.19(b). Pointing out that the City has not definite pre-hearing exchange. It requests the City to provide the depositions of Mr. Lara and Mr. Kent will be granted.²²

Complainant filed a motion on July 7, 1993, for a more thorough examination having no objection, the City's motion to take to preserve the evidence for hearing.

sought cannot be obtained by alternate methods and is necessary original pleadings. The City alleges that the information changed if based on erroneous information contained in EPA's relationship to the alleged violations and whether it should be possession, does not contain sufficient detail including its allegation all of the penalty information in Complainant's asserts that the information received from Complainant, which is longer with EPA's Region VIII enforcement office. The City the penalty calculation in the original complainant, and is no calculations, and the other individual, Mr. John Lara, performed a consultant retained by EPA to assist in performing the penalty

dated November 6, 1992 (attached to Motion for Production of dated November 16, 1992, and from Mr. Pirnner, Director of SDENR, December 16, 1992, and from Mr. Robert E. Roberts, Secretary of SDENR, dated VIII from Mr. Robert E. Roberts, Secretary of SDENR, dated of Sioux Falls. The record also includes Letters to EPA Region Mr. Kappel, and Gary Johnson, Utilities Commissioner for the City of Sioux Falls. The record currently includes affidavits of Mr. Johnson, the EPA as evidence at the hearing.

The record currently includes affidavits of Mr. Johnson, the EPA as evidence at the hearing.

of the documents, memoranda and exhibits it has previously given identified its exhibits by stating that it "intends to offer all for a narrative summary of expected testimony. The City affidavits, intended to serve as further response to the request by providing documents, including two appendices of documentation attached to its answer, which fully disclose its response to this action. The City has enclosed supplemental documentation attached to its answer, which fully discloses its believes it has completed with the pre-hearing exchange rules, exchange, the City states by letter, dated July 19, 1993, that responding to the motion for a more definite pre-hearing affidavits.

affidavits. It believes it has completed with the pre-hearing exchange rules, exchange, the City states by letter, dated July 19, 1993, that affidavits present intended to be offered at the hearing have been filed. It requests that the file documents to be received admissions and for production of documents, and supporting in evidence, including the answer, motions to strike and to be filed. It requests that the file documents to be received at the hearing.

(at 2, ¶ 4), the City states that all of the exhibits and in its pre-hearing exchange statement, dated June 22, 1993

with its pre-hearing exchange statement, as required by 40 C.F.R. § 22.05(b).

documents). The only proposed witness listed by the City who does not appear to have provided supporting documentation is Mr. Larry Mutchler, City Pretrial Treatment Coordinator. However, the pre-hearing exchange letter, dated March 9, 1993, does not narrate a narrative of expected testimony, but provides that the parties "furnish the names of expected witnesses and copies of any documents or exhibits proposed to be offered at the hearing . . .". There is no basis for requiring the City to provide narratives of expected testimony in this case.

The pre-hearing letter also does not require the exhibits to be listed and identified. The listing and numbering of exhibits enables orderly presentation at the evidentiary hearing, and if this case proceeds to hearing, the documents are expected to be identified at that time.

The City does not address its failure to include a certificate of service. However, because its pre-hearing exchange documents were due on June 28, 1993, and were received in the Office of Administrative Law judges on June 24 and July 1, 1993, and Complainant does not allege that they were untimely filed, it is harmless error on the part of the City.

Complainant's motion for more definite pre-hearing exchange will be denied.

~~Administrator Law Judge
Spencer T. Nissen~~

Dated this 13 day of July 1994.

is DENIED.

1. Complainant's motions to strike the City's response, dated July 2, 1993, the letter, dated July 12, 1993, and the memoranda, dated July 19 and August 13, 1993, are DENIED.
2. The City's motion to dismiss certain allegations in the complaint is DENIED.
3. The City's motion to strike certain allegations in the complaint is DENIED.
4. Complainant's motion to amend the complainant is GRANTED.
5. The City's motion for production of documents is DENIED.
6. The City's motion to take the depositions of Messrs. Lara and Kent is GRANTED.
7. Complainant's motion for more definite pre-hearing exchange is DENIED.

O R D E R

ADDRESSEES:

DATE: JULY 13, 1994

Helen F. Handon
Legal Staff Assistant
Janeet F. Brekke, Esq.
Chief Assitant City Attorney
224 West Sioux Ninth Street
Sioux Falls, SD 57102
Raymond A. Haik, Esq.
Popham, Haik, Schomburich,
and Kaufman, Ltd.
224 South Ninth Street
Minneapolis, MN 55402
Veronica Eady, Esq.
Assistant Regional Counsel
U.S. EPA, Region VII
999 - 18th Street
Denver, CO 80202-2466
MS. Joanne McKinstry
Regional Hearing Clerk
U.S. EPA, Region VIII
999 - 18th Street
Denver, CO 80202-2466
Denver, CO 80202-2466

This is to certify that the original of this ORDER ON MOTIONS,
dated July 13, 1994, in re: City of Sioux Falls, SD, Dkt. No. CWA-
VIII-93-03-P-III, was mailed to the Regional Hearing Clerk, Reg.
VIII, and a copy was mailed to Respondent and Complainant (see List
of addressees).

Glen J. Anderson
CERTIFICATE OF SERVICE